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In the Supreme Court of the United States

OCTOBER TERM, 1996

TERESA MARIE PANTANI AND EDMUND L. PANTANI,
PETITIONERS

v.

MARGARET MILNER RICHARDSON,
COMMISSIONER OF THE IRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
GILBERT S. ROTHENBERG
BRIDGET M. ROWAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a remittance made by petitioners in connection with a request for an extension of time to file their income tax return was a payment of tax that commenced the running of the statute of limtations for a subsequent refund claim seeking recovery of that payment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is unpublished, but the decision is noted at 104 F.3d 352 (Table). The opinion of the district court (Pet. App. B6-B10) is reported at 902 F. Supp. 24.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1996. The petition for a writ of certiorari was filed on January 29, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 6151(a) of the Internal Revenue Code, 26 U.S.C. 6151(a), provides:

> **General rule.**—Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

2. Section 6511(b) of the Internal Revenue Code, 26 U.S.C. 6511(b), provides, in relevant part:

> **Limitations on allowance of credits and refunds**
>
> **(1) Filing of claim within prescribed period**
>
> No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.
>
> **(2) Limit on amount of credit or refund**
>
> **(A) Limit where claim filed within 3-year period**
>
> If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid

within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) Limit where claim not filed within 3-year period

If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

(C) Limit if no claim filed

If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

* * * * *

3. Section 6513(b) of the Internal Revenue Code, 26 U.S.C. 6513(b), provides in relevant part:

Prepaid income tax For purposes of section 6511 or 6512—

* * * * *

(2) Any amount paid as estimated income tax for any taxable year shall be deemed to have

been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

* * * * *

STATEMENT

1. On April 15, 1987, petitioners remitted the sum of $86,000 to the Internal Revenue Service. This amount represented their estimated liability for income taxes for 1986. The remittance accompanied petitioners' application for a four-month extension of time for the filing of their 1986 tax return (Pet. App. A3). Although the requested four-month extension was granted, petitioners did not actually file their 1986 tax return until more than five years later, in August 1992 (*id.* at B7-B8). The return that they ultimately filed for 1986 showed a tax liability of $54,476 and claimed an overpayment of $33,571.

Petitioners sought to have the amount of the overpayment claimed on their belated 1986 tax return credited against their tax liability for 1987. The Service denied that request because the 1986 taxes had been paid more than three years before the refund claim was made and recovery was therefore barred by the express terms of 26 U.S.C. 6511(b)(2)(A).

2. Petitioners then commenced this tax refund suit in federal district court. They asserted that their refund claim was not untimely because the $86,000 remittance that they made in April 1987—in connection with their request for a four-month extension of time to file their 1986 return—was a "deposit" rather than a "payment" (Pet. App. B9; see also *id.* at A3). Based on the theory that the 1987 payment was

only a "deposit," petitioners claimed that the statute of limitations on refund claims in 26 U.S.C. 6511(b)(2)(A) did not bar recovery in this case.

The United States moved for summary judgment, and petitioners failed to make any timely response. The district court granted summary judgment for the government "absent objection" by petitioners (Pet. App. B7). The court thereafter refused petitioners' request for reconsideration. The court noted that petitioners had offered no valid reason for not responding to the summary judgment motion and that their "failure to interpose any opposition was not excused" (*ibid.*).

The district court also awarded sanctions against petitioners because of the "false facts" that they had asserted in the complaint (Pet. App. B7). Petitioners had alleged in the complaint that their refund claim was timely because their return had been filed in August 1987, within the period of the four-month extension of time obtained in April 1987. The district court explained, however, that the tax return forms that petitioners claimed to have filed in August 1987 did not even exist at that time and that it was therefore clear that the return offered by petitioners had been "backdated" by them (*id.* at B8). The district court awarded sanctions against petitioners under Rule 11 of the Federal Rules of Civil Procedure for their dishonest use of a fraudulent exhibit that improperly purported to show a timely filing (*id.* at B7-B8).

3. The court of appeals affirmed (Pet. App. A1-A5). The court first stated that it was not clear whether petitioners sought to challenge the Rule 11 sanctions entered by the district court but that, "[i]f they do, we do not hesitate to find no abuse of discretion in the

district court's award" (*id.* at A2). The court also affirmed the judgment in favor of the United States on the merits of the refund claim.[1]

The court stated that the contention that the remittance of $86,000 made by petiitoners was a "deposit" rather than a "payment" was "meritless" (Pet. App. A3). The court noted that 26 U.S.C. 6513(b)(2) expressly provides that any remittance submitted "as estimated income tax" is to be "deemed to have been paid on the last day prescribed for filing the return * * * (determined without regard to any extension of time * * *)." The court agreed with the several other appellate courts that have held that a remittance submitted "as estimated income tax" is therefore a "payment" of tax, not a "deposit," as a matter of law. Pet. App. A3, citing, *e.g.*, *Gabelman* v. *Commissioner*, 86 F.3d 609, 611-613 (6th Cir. 1996); *Weigand* v. *United States*, 760 F.2d 1072, 1073-1074 (10th Cir. 1985).

The court further ruled that, even if the question whether the remittance was a "payment" or a "deposit" should be determined as a question of fact, rather than as one of law, petitioner's admissions during discovery required the conclusion that the remittance was intended as a "payment." Because—both as a matter of fact and as a matter of law—the remittance was a "payment" and not a "deposit," the court held that its recovery is barred by the statute of

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[1] The government did not urge the court of appeals to affirm the award of summary judgment on the ground that petitioners had waived their right to oppose the summary judgment motion. The court of appeals therefore addressed the merits of the underlying tax issue and affirmed on that basis (Pet. App. A2-A5).

limitations contained in 26 U.S.C. 6511(b)(2) (Pet. App. A5).

ARGUMENT

The court of appeals correctly concluded that the remittance of estimated taxes submitted by petitioners in April 1987 was a "payment" of taxes and that their belated request for a refund was untimely. Although various circuits have applied different tests for determining whether a "payment" or "deposit" has been made, and although that issue may in a future case merit this Court's review, the present case does not provide an appropriate vehicle for resolving these disparate analyses.

1. The courts of appeals have not applied a uniform analysis in determining whether a remittance of an estimated tax liability is a "payment" of tax or a "deposit." Some circuits have concluded, as the court did in this case, that a remittance of an estimated tax is a "payment" of tax as a matter of law. See Pet. App. A3 (citing cases). Other circuits have concluded that, in determining whether a remittance is a deposit or a payment, the appropriate inquiry in every case should focus on the facts and circumstances under which the remittance was made. See, *e.g.*, *Zeier* v. *IRS*, 80 F.3d 1360 (9th Cir. 1996); *Moran* v. *United States*, 63 F.3d 663, 667-668 (7th Cir. 1995); *Ewing* v. *United States*, 914 F.2d 499, 502-503 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991); *Ameel* v. *United States*, 426 F.2d 1270, 1273 (6th Cir. 1970); *Fortugno* v. *Commissioner*, 353 F.2d 429 (3d Cir. 1965), cert. dismissed, 385 U.S. 954 (1966); *Cohen* v. *United States*, 995 F.2d 205 (Fed. Cir. 1993). That inquiry typically seeks to determine the taxpayer's "intent" in making the remittance.

The difference in the methods of analysis applied by these circuits is not, however, material to the disposition of the present case. In the courts below, petitioners asserted that, viewing the facts in their entirety, their 1987 remittance of estimated taxes for 1986 should be treated as a "deposit" rather than as a "payment." As the court of appeals observed, however, even if this issue were treated as a question of fact—rather than as one of law—the remittance made in this case "constituted a payment" based upon "Mr. Pantani's own admission during a deposition" (Pet. App. A4). The court noted that Mr. Pantani acknowledged that his intent in submitting the remittance was "[t]o send in a payment" that would "be applied toward [his] 1986 income tax liability" (*ibid.*). As the court noted, "[w]hat Mr. Pantani describes is a payment of estimated tax, not a deposit" (*id.* at A5). That factual conclusion is amply supported by the record (*id.* at A4-A5), and any dispute about its correctness does not present a question warranting this Court's review.

Whether the status of the remittance of estimated taxes as a "payment" or as a "deposit" is to be determined as a matter of law or as a matter of fact under the standards discussed above, the same conclusion would be reached in this case. The present case therefore does not provide an appropriate vehicle for resolving the different methods of analyses applied by these circuits on this issue. See *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

2. The Fifth Circuit has applied a different test in determining whether a remittance is a "payment" or a "deposit." Under the standard applied in that circuit, any remittance made before the underlying tax liability is assessed is treated as a "deposit," rather

than as a "payment," as a matter of law. See, *e.g.*, *Harden* v. *United States*, 76 A.F.T.R. 2d (P-H) 95-7980 (5th Cir. Nov. 30, 1995 (No. 95-40046)); *Ford* v. *United States*, 618 F.2d 357 (5th Cir. 1980); *Thomas* v. *Mercantile National Bank*, 204 F.2d 943 (5th Cir. 1953).

In neither of the courts below, however, did petitioners cite or rely upon the Fifth Circuit precedent or the rule applied in that circuit. In particular, petitioners did not claim that their remittance was a "deposit" as a matter of law because it was made before the tax was assessed. Instead, petitioners argued only that their remittance was a "deposit" as a matter of fact because their intent was not to make a payment (Pet. App. A3-A4). The argument that petitioners now seek to raise in their petition by citing *Harden* for the first time (Pet. 3) was not raised or addressed below. This case thus does not present a suitable occasion for review of the singular rule adopted and applied in the Fifth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
GILBERT S. ROTHENBERG
BRIDGET M. ROWAN
Attorneys

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